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HISTORICAL JURISPRUDENCE IN GERMANY.

WHEN the reception of the Roman law in Germany had become an established fact, there followed a period, culminating about the middle of the sixteenth century, when the whole western part of continental Europe recognized practically one system of jurisprudence. In Germany, wherever, as in the lower courts of limited jurisdiction, the administration of justice had not lost its close communion with popular custom and sentiment, the principles of Germanic law preserved their identity ; but they no longer commanded respect or recognition among those who studied and practised the law as a profession. The spirit of the Renaissance had exerted as strong an influence in this as in any other field. Ever since the opening of the Italian universities, young Germans of rank and ambition had crossed the Alps to share in the newly revived learning of the Roman law, and with their knowledge of the *Pandects* they carried home an open contempt for the native laws of their own country. While the codified systems of the Roman, the canon and the feudal law were adopted entire, the German laws were recognized only as special customs, to be proved as facts and to be operative under Roman theories of prescription. It is not difficult to understand the irresistible fascination which a system like that of the *Digest* must have had for the legal mind ; the influence of Italian jurists is more remarkable. Many parts of the Roman law had necessarily to be excluded from the reception as altogether unsuited to the conditions of the age ; but even in this sifting and rejecting process, the precedent of Italian commentators was closely followed in Germany. The methods of the Italian schools where the Roman law had first been taught were naturally enough adopted in the new German universities,—methods in which a close regard for practical application excluded any free scientific treatment of the material. The same foreign influence is

manifested by the great number of Italian collections of cases and precedents that were published in Germany. The connection with France was hardly less close than with Italy. The authority of such civilians as Cujas and Doneau was recognized throughout Europe. The latter taught law at Heidelberg; and many other French jurists, when forced to leave France on account of their Protestant faith, found an honorable refuge in German universities.

This international unity of the science of jurisprudence would have been impossible without the general use of Latin as the common language of all learning; but it depended still more upon the substantial identity of legal principles among the various nations, which resulted from the recognition of the Roman law as the governing system. The Holy Roman Empire considered the Roman law as a natural inheritance, and the territorial princes found that its adoption served their own dynastic interests. Its study was a necessary qualification for any higher official career, and in point of dignity the degree of doctor of laws was considered equivalent to a title of nobility. It was natural that such advantages should attract the best talent among the younger generation. That the Roman law was in a manner unpopular, foreign and exclusive, far from weakening its hold upon lawyers, was more likely to have the contrary effect. Certainly such a consideration could have no weight against the admitted technical and scientific superiority of the *Digest*. But notwithstanding all these elements of strength, it is difficult to conceive how the Roman law could have spread so widely without some measure of popular support. As a matter of fact, it met with little favor on the part of the common people. It was one of the principal grievances of the peasants at the time of their great revolt in the sixteenth century. Their protests and remonstrances, however, had little effect. In a struggle between two legal systems, technical perfection counts for more than popular sentiment; and in technical perfection the German law was hopelessly inferior. In the eyes of the civilians it was a barbarian, almost a foreign system. The attempt to re-publish some of the old German popular

codes was actually criticized as a violation of Justinian's edict against the revival of antiquated laws. The Germanic system could not be destroyed; but the very hope of its preservation lay in a temporary defeat, which compelled it to yield and to withdraw into lower and more limited spheres, where obscurity was its best protection.

It is impossible to say what the outcome of this period of legal history would have been, if there had been a constant and uninterrupted progress on the lines of development then laid down. We may picture in imagination as the final result, a system of universal law raised upon the basis of an international science of jurisprudence. But in the light of actual history, this period of unity appears rather as a period of preparation and transition, during which the germs of national formations were slowly maturing, which were to be engrafted upon the common Roman stem. In the seventeenth century came a reaction. It was directed on the one hand against the purely exegetical and practical treatment of the Roman law; on the other, against its absolute domination, to the almost total exclusion of territorial customs. Thus two opposite tendencies prevailed at the same time: one, mainly speculative, seeking to overcome the limitations of the Roman law by resort to the utopian regions of a law of nature; the other, under the influence of the new inductive philosophy, opposing the foreign system by a patient study of positive facts and by a return to the rich material of native law and custom. The former tendency was represented chiefly by Pufendorf; the latter marked the beginning of historical jurisprudence, and found its foremost representative in Conring, whose work *De Origine Juris Germanici* was published in 1643. In the light of sober historical investigation many an argument in favor of the Roman law was now discovered to be a fallacy. It had been generally believed, for example, that the Roman law had been introduced by an express act of imperial legislation; Conring showed that this was an error. The Roman law thereby lost a fictitious title, and its claim to recognition was put upon the true foundation, *viz.* the reception by the universities and by the

practice of the learned judges. The study of jurisprudence, which up to that time had been almost entirely concentrated upon the *Institutes* and the *Digest*, now began to embrace those Germanic legal institutions which the Roman law had never been able to eradicate. Since the Roman law was recognized to have been received by custom, it was now admitted that such parts as were not congenial to German ideas and institutions could not have been included in the reception. Efforts were made accordingly to assimilate the two systems, and the result of this modernizing and Germanizing process was the so-called *usus modernus Pandectarum*, which became the basis of German civil law. Beyond this, however, jurisprudence gained neither in method nor in content. The scientific work, if it may be so called, consisted chiefly in disquisitions on dogmatic and practical subjects, and, so far as it was historical, in the collection and study of antiquities.

The eighteenth century is not remarkable for any great movement in German scientific jurisprudence. The humanitarian philosophy which, having become popular in France, had spread from there into Germany, and which led to reforms often of a revolutionary character in all departments of legislation, was merely the consequence of movements of thought and speculation that had originated in the preceding century. It carried no new life into the work of theoretical jurists. The only man who approached the study of legal institutions with more than the spirit of the abstract philosopher, antiquarian or practitioner, Justus Moeser, was not a man of the universities. He opposed the new philosophical school that drew its inspiration from France. His essays breathe the true historical spirit ; but his conclusions are frequently vitiated by a preference for the "good old times," which forms the burden of all his writings and which at times makes him appear narrow and extreme. His work, moreover, lacked scientific method and completeness. But he at least gave inspiration where the professors failed to awaken the faintest interest. Complaints about the dry and barren character of the study of jurisprudence at the universities were loud and general. Men of genius and ability, like

young Goethe, found in this department of learning nothing that could attract them, and the law was studied merely with a view to the professional career to which it afforded access. And yet at the end of the last century the state of the private law in Germany was such that a scientific and historical examination of the whole field was greatly needed. The multiplicity of systems was most bewildering. The Roman and the German law stood side by side with conflicting claims and uncertain boundary lines. The former was at least a unit in form and in theory ; but the latter was split into as many different varieties and systems as there were or had been sovereign territories in Germany,—and their name was legion. There had accumulated a vast wealth of legal material, unsifted and undigested. The time had come to create out of this incoherent mass one organic whole,—to establish unity of law, by perfecting the naturalization of the Roman and searching out the fundamental principles of the German system, and by reconciling the conflicting tendencies of the two. The various attempts to bring order into this chaos by codification show how urgent was the need of reform, and it was eminently desirable that the practical work of the legislator and statesman should be guided by principles which could be revealed only by the patient researches of the student and the scholar.

The time was favorable to scientific reforms. Kant's critical philosophy had stimulated all departments of intellectual activity into new life, while the achievements and the spirit of a classical literature were infusing some elements of broad and enlightened culture into even the most pedantic learning. Again, from a somewhat narrower point of view, the study of jurisprudence profited by the intense national spirit which, in the beginning of the present century, revived interest in whatever was German in character and purpose,—in German language, German history, German antiquities and even in German law. Fortunately, the same time in which these conditions were combined also furnished the men who could turn them to account. Two men above all others are identified with the renaissance of jurisprudence : Eichhorn and Savigny. Niebuhr,

the historian, lent his invaluable aid from a neighboring field. His investigations and discoveries in the earlier periods of Roman history had a direct bearing upon the knowledge of the Roman law in its beginnings. Eichhorn created the historical study of the German law. He was the first to present its history in a connected and organic form, emphasizing at the same time the place of legal institutions in the general life and history of the nation. Niebuhr's *Roman History* appeared 1811, Eichhorn's *History of the German Law* in 1808, Savigny's treatise on *Possession* in 1803.

Savigny's leading position was secure from the first, and his fame has not been eclipsed by that of any other jurist. The impression which his strong individuality made upon his contemporaries must have been wonderful, and some of this personal influence seems to have been perpetuated in his writings. His work alone would have been sufficient to effect a complete regeneration of jurisprudence. He found it a dry and formal system of learning; he left it a liberal science of infinite possibilities. He was to the science of law what Lessing was to literature, what Niebuhr was to history, or Ritter to geography. His work, like Blackstone's, is still read and studied while all earlier legal writings have become antiquated. The effect of his very first treatise was marvellous. His historical genius, the elegance and precision of his reasoning and his classical treatment of legal subjects raised jurisprudence at once to a height which it had never before approached. Up to that time the *Digest* and the *Institutes* had been treated merely as a code or statute book,—a collection of rules to be adapted, as best might be, to the requirements of modern practice. The Roman law had been regarded as a system that had to be accepted, because it was the law in force. Scientifically it had hardly advanced beyond the stage in which Justinian had left it. The Romans themselves had not treated it as a science, had not penetrated into the *raison d'être* of its principles, or attempted to study the relation between the various parts of a complicated organism. They had, however, the same justification or excuse that the English lawyers have now, namely, that the law was a

creation of their own and part of their life, and that they supplied the fundamental unity of system by their own living conceptions and by the spirit of a truly national jurisprudence. To the Germans, however, the Roman law was really a foreign body, which, to be absorbed and assimilated, had first to be digested. If it was not to remain a foreign system—so it was argued—the German jurists would have to analyze its principles, and out of these principles to construct a scientific jurisprudence, thus making it a new and national creation.

It is obvious that this treatment of jurisprudence was above all historical. However satisfactory the old method was for the routine of practice, it was certainly impossible to comprehend the vital spirit of the Roman law without a knowledge of the various phases of growth through which it had gone. Savigny became the enthusiastic leader of the new historical school which found the centre of its activity in the recently established University of Berlin. In 1815, the publication of a *Journal of Historical Jurisprudence* was undertaken by Savigny, Eichhorn and Goeschen. In the first number Savigny developed a sort of programme of the aims and views of the new jurisprudence. Evidently there was only one true method of legal science, and Savigny was its prophet. Already in 1814, in a small treatise on the *Vocation of our time for Legislation and Jurisprudence*, which became famous in connection with the question of codification, he had laid down the views which were accepted by the historical school as to the nature and origin of law. He started from a conception of law which was then new, but from which few would now withhold their assent, even though unwilling to concur in all of Savigny's conclusions. Law to him was a creation of the collective national mind, intimately interwoven with national life and character and with the permanent conditions of the national civilization. It was no more the product of an arbitrary will than language or religion. The work of many generations, it was beyond the absolute control of any particular age. Therefore Savigny regarded historical continuity as the first condition of healthy national life. "The true doctrine," he says,

teaches that every age creates its world not for itself and arbitrarily, but in close communion with the whole past. In consequence, every age must recognize something that is given, which is necessary and free at the same time : necessary because not dependent upon the arbitrary will of the present ; free because as little dependent upon a foreign command, but rather produced by the higher nature of the people as a constantly growing and developing body.

And more particularly with regard to jurisprudence :

The substance of the law is given by the whole history of the nation, not arbitrarily, so that it might happen to be this or that or something else, but grown out of the genius of the nation and its history. The deliberate effort of every age must be directed towards the task of understanding, renewing and keeping alive that necessarily given material.

“The historical conception of law,” says an eminent German jurist,¹

sees in the mass of existing rules, not the aggregate product of individual and separate wills, but the creation of the nation's legal instinct, evolved out of the conditions of changing moral ideas, economic and other determining influences, the result of national reasoning for thousands of years, which in the formation of a national system of law has to overcome difficulties and obstacles of all kinds. The historical conception of law does not merely deal with the interpretation of statutes, but its task is to teach the comprehension of a rule of law as the last formal expression of a process at work in the national genius ; it attempts to reproduce the peculiar mode of legal thought of every age, and thus represents the connection of law with the moral life of the nation. A natural consequence of this principle in its application to German jurisprudence was the division of the material into the two great masses of Roman and German law, because only in this separation the view of the connection between nationality and law could have its full force.

To Savigny and his school the understanding of the past involved a close study of all preserved records and authorities. The work of historical investigation was, however, to be confined to the Roman, the German and the canon law. From the very beginning the most excellent results were achieved in

¹ Gerber, formerly professor of jurisprudence at Leipzig.

this field by such men as Savigny, Eichhorn, Niebuhr, Rudorff, Grimm and many others. By a peculiar favor of circumstances it was just at that time that the material for historico-legal research was enriched by the most valuable additions. In 1816 Niebuhr, by a happy chance, discovered at Verona the palimpsest from which the greater part of Gaius's invaluable *Institutes* was given back to the world. There followed in almost unbroken succession a series of other important discoveries, partly of manuscripts, partly of inscriptions on monuments, *etc.* The importance of these latter records enlisted this branch of archæology most successfully in the service of historical jurisprudence. Even now, in retracing the work done in Savigny's days and under his guidance, we can feel some of the enthusiasm which inspired a number of the ablest scholars to co-operation in a field in which they were virtually pioneers. Savigny's greatest historical work was the *History of the Roman Law in the Middle Ages*; and with very few exceptions, his minor treatises and dissertations dealt with Roman law. Eichhorn was recognized as foremost in the department of German legal history. The lead of these two was followed by a host of scholars of ability and astonishing industry. The admirable and efficient organization of science in the universities secured the necessary distribution of labor, with an intelligent appreciation of the work to be done. All the recesses of German and Roman legal history were explored; the old German codes were re-edited, the inexhaustible records of municipal history were investigated, the philological method was applied to the criticism of Roman legal writers, and the collection of inscriptions was undertaken on a systematic plan. Every branch or phase of German or Roman legal history was searched and researched with the utmost patience, and with constant rejection or modification of former results, — the comparative freedom from the worship of authority being one of the chief distinctions of German scholarship, as it was the indispensable condition of scientific progress.

It is, however, pertinent to ask how far Savigny's ideal conception of the value and aim of historical jurisprudence was verified. On this point the jurist above quoted says :

It is well known how this historical principle influenced the development of our science. The right knowledge of actual law was infinitely promoted. And this knowledge was deepened to an extent hardly anticipated, resulting not only in the formal abstraction of ideas and principles, but including the conception of ultimately practical considerations. So also the practice of the law has gained ; for all deeper historical knowledge of law affords greater ease and security in determining its present applicability. Especially the science of the German law, embracing as it does an extraordinary mass of native material, has gained a height from which alone every individual expression of particular laws can be truly measured. This distinguishes German jurisprudence from that of other civilized nations. Compared with the English learning of statutes and precedents, it is a true science in the highest sense of the word, constantly aspiring to these two great aims : to comprehend the wealth of historical growth, and to transform the ideas underlying the historical material into forces of actual and present operation.

This was the view of the historical jurists, which, however, was not allowed to pass without opposition. Something like partisan spirit was carried into the question by the antagonism of the so-called philosophical school. When Savigny explained the principle and the scope of the historical school, he alluded to another school, which seemed to him so indefinite, so unprincipled and so mixed of various elements, that he could find no better term for it than "unhistorical." This implied, of course, that his school embraced everything that was true, scientific and excellent ; the other school, all that was the contrary. This other school, however, was not without its able advocates, foremost among whom was Professor Gans of Berlin. To most students Gans is little more than a name ; but in his day he was the leader of a party and somewhat of an intellectual power. As he is mentioned repeatedly in Heine's works, his name is secure from entire oblivion ; although the nature of Heine's comments may hardly appear gratifying to Gans's admirers. Gans professed himself an enthusiastic follower of Hegel, and the darkness of the master's teaching so obscures the legal philosophy of the disciple, that sometimes we stand hopeless before the oracles of his wisdom. But the preface to his *Law of Suc-*

cession in its Universal Development is well worth reading, as an exposition of the tendencies of the two opposing schools and as a reply to Savigny's arguments.

The point at issue between the two schools was really as old as human nature and common to all science. It arose out of the conflicting claims of the past and the present. The historical jurists were strongly impressed with the power of historical conditions, the force of tradition, the danger of change, the value of conservative sentiment, the accumulated experience of by-gone ages, and the tenacity of habits of life and thought by mere force of prescription, — all conditions of strong effect in the domain of private law. The philosophical jurists stood for actual and living forces that ought to assert themselves against the influence of ages that were dead and buried, and against a past that had no rights except by sufferance from the present. It might seem that the science of jurisprudence was not required to give a decision favoring one view or the other, — that its function was to measure the conflicting forces, to determine their mutual operation and interaction and to recognize both alike as necessary elements in the evolution of law. The conflict between the two schools would then have been of a purely abstract character, involving only the relative strength of the antagonistic elements. But the natural desire to be felt as a controlling influence in shaping practical affairs led constantly to encroachments upon the domain of legislative problems.

The two parties first joined issue on a question that could never be solved by theory, — that of the codification of the civil law for the whole of Germany. Thibaut had started the controversy by a pamphlet strongly advocating such codification, and Savigny replied in the famous essay on the vocation of his age for legislation and jurisprudence. He made this the occasion of an elaborate discussion of the rise and growth of private law. As is well known, his conclusion was that, since law was chiefly a product of given historical conditions, a full understanding of those conditions was the indispensable prerequisite of any productive activity, and that his time was not qualified for such a task. Practical reforms would have to wait

until science and theory had done their work. It is easy to understand that such a view would meet with strong opposition. The age which had seen great reforms in government and administration, would hardly be inclined to proclaim its own impotence in dealing with the problems of the private law; and the idea of deferring reforms until science should have completed its task and theorists should have arrived at a unanimous conclusion, could not appear acceptable to practical statesmen. The philosophical school, moreover, considered the burden of historical survivals heavy enough without increasing it by constant reference to the past; and they knew that the habit of looking backward was not favorable to the spirit of reform. The conscious and artificial revival of conditions of the past which was urged by the historical school must not be identified with that instinctive conservative sense of historical continuity which lives in English jurisprudence, and there satisfies the conditions of legal development required by Savigny. Such an instinct cannot be created by any amount of historical study. Yet the jurists of Savigny's school considered their science merely in the light of a great school for practice; it was declared that all historical studies should find their consummation in a truly national code. This position was attacked by the philosophical school, and here it presented a strong case. Gans clearly distinguished between the art and the science of law, and sneered at the idea of a science which was to be merely the handmaid of practice. He repudiated the absolute dependence upon history, urging the rights of the living against the claims of the dead. "It is true," he said, "that in every time there lives the whole past, but the past changed into another moment. The actual and active present must not be conscious of that past; life must not feel the death out of which it has grown."

Returning to the purely scientific aspect of the controversy, it was natural that fair-minded representatives of either school should see that jurisprudence could not rest on either philosophy or history exclusively. This difficulty was overcome by each side arrogating to itself the credit of a true combination of both

elements. Savigny, as we have seen, refused to his opponents any designation but that of "unhistorical," claiming the true philosophy for himself; and his fundamental conception of law was doubtless philosophical, formed more by intuition than by historical researches. On the other hand, the philosophical school admitted the value both of Savigny's views and of his followers' achievements; but they insisted that the former were too narrow and the latter too barren; they required something besides history, and laid the principal stress on that additional element.

It cannot be denied that, from the scholar's point of view, the historical stands far above the philosophical school. The former had the advantage of being led by men of unrivalled scholarship. It wasted no time on general theories. It was not split into dissenting sects. The direction once given, the possibilities of valuable work in the field of historical research were unlimited. With the philosophical school we are not here concerned further than to show its opposition to the historical school. An intelligent criticism of its work would require an extended review of the condition of German philosophy in the first half of this century, for which this is not the place. The fact must however be stated, that while the aims of the philosophical school were large and profound, and scientific in the best sense, it was very poor in corresponding tangible results. This failure had the effect of bringing legal philosophy generally into disrepute, and this, again, reacted unfavorably upon the historical school. The tendency of that school was naturally to overestimate the value of positive data and to concentrate its energy upon historical detail. Savigny himself encouraged this.

It is the triumph of historical science [he said] if it succeeds in conveying the results of its investigations to our mind directly and immediately, like a living reality. . . . But it is not always possible so to penetrate into the true spirit of history, and the effort to accomplish no less result than this inevitably leads to a superficial treatment, which, with an empty pretence of philosophy, is indeed more barren than the opposite purely positive tendency.

He quotes Goethe's words: "I do not know of any worse pretension, than if one claims to understand the spirit, to whom

the letter is not clear and familiar"; but he fails to add that no accumulation of letters will supply the spirit, unless they are read by a light which has to come from other sources. The exaggerated view of the importance of a mass of facts and data easily leads to a form of science which thrives on industrious and painstaking mediocrity, which revels in minute criticism and ingenious conjectures — erroneous, as has been shown, in nine cases out of ten — and to which the discovery of new manuscript is the highest triumph of scientific achievement :

Und ach, entrollst du gar ein würdig Pergamen,
So steigt der ganze Himmel zu dir nieder.

There is some force in what Gans said in opposition to Savigny's views :

The historical school has generated among jurists a deep-seated hatred of philosophy and of all thought not engaged in the discovery of facts, — a hatred which here appears directed against philosophical law, so that it is mentioned only with a sneer and with reprobation, as if the historical jurist could have no pure conception of history, were he to acknowledge a law of nature. Out of this school also has proceeded the worship of what is outward and positive. To every note and passing dictum an exaggerated importance has been attributed, and under the noise and clamor of that worship the true essence, the spirit, has been completely lost.

Perhaps this statement is colored by partisan spirit, and allowance must be made for exaggeration. The historical school had doubtless widened ideas of law and given a higher dignity to the science. In its beginning the school had felt the call of a mission, in which it had by no means entirely failed. But it would have been difficult for any movement that began with so much genius and inspiration to maintain itself on the same level on which it had started. The nature of the work itself invited a waste of energy. It is an apparent advantage of legal history that most of its material is presented to us directly, and not through a medium. It may seem as if the legal authorities, if completely collected and correctly transmitted, were really perfect and unimpeachable evidence. But this view does not take

into account the unavoidable imperfections of the law as it is written and reported — its uncertainties, gaps and inconsistencies. Moreover, there is often a strong undercurrent of living sentiment which is at variance with the formal expression of the legislator's will. The law as it appears on the statute book may be different from the law which practically governs civil relations. The true principles must sometimes be read between the lines, and the "notes and passing dicta," of which Gans speaks, often contain valuable information. For this reason a peculiar significance may attach to any term or expression under given circumstances. The historical jurists were therefore constantly tempted into drawing distinctions of the utmost subtlety, into interpretations that could be neither proved nor disproved. They were prone to establish doctrines on very slender foundations, and to engage in interminable disputes that could lead to no result. With a constant recurrence to the same problems and a never-failing crop of small controversies, there was a lack of large and fundamental theories that might have advanced the true conception of law ; and the vain attempts to carry conviction to other minds, in cases where the evidence was susceptible of more than one interpretation, absorbed much labor and ingenuity that might have been employed to better advantage.

There was one resource against the dangers flowing from these peculiar difficulties of evidence, and that was to extend the field of observation. The information derived from different systems of law would have been an admirable corrective for doubtful conclusions drawn from defective or misleading premises. But this was just what the historical school neglected to obtain. We have seen that in their practical views they always referred the present to the past ; in their theoretical work, many of them fell into the graver error of constantly referring the past to the present. Historical study was a school of civil legislation ; therefore historical research was burdened with a practical purpose which did not advance the true interests of science. Savigny himself, by precept and by example, had encouraged the limitation of historical jurisprudence

to the Roman, the canon and the German law. The few writers who ventured outside of this territory confined their researches in foreign law chiefly to public or *quasi*-public institutions. To the philosophical school is due the credit of having insisted, from the very outset, on the value of comparative jurisprudence. They pointed to Montesquieu's work as a step in the right direction, while the historians undervalued, perhaps, its easy deductions and wide generalizations, bold indeed, and often mistaken, yet eminently suggestive. Thibaut had said that ten clever lectures on the jurisprudence of the Persians or Chinese would convey to students a better understanding of law, than a hundred on the miserable failures in the legislation on intestate succession from Augustus to Justinian. Gans placed these words at the head of his great comparative study on the laws of succession, while Savigny made them the subject of sarcastic criticism. But with few exceptions, the philosophical school did little or nothing to work out its own suggestions. The solid and conservative work of the historical school attached to it the best scholarship in legal science. With all their faults, the historical jurists were at least first of all jurists; the representatives of legal philosophy were first of all philosophers, and some of them were no jurists at all. No reform in jurisprudence could be successful without enlisting the forces of the former school.

It is significant that dissatisfaction is beginning to spread in the ranks of the historical jurists. There is a feeling that the results obtained stand in no just proportion to the immense amount of labor that has been expended. The great achievements in other departments of science have aroused in many jurists the unpleasant consciousness that they are lagging behind in the race. They find it no longer possible to work in self-sufficient isolation, and to disregard the larger standards established by new discoveries in other fields of knowledge. It is becoming generally recognized that Savigny's fundamental theory of law cannot remain unshaken for all time. It has been remarked that his conception of the origin of law as exclusively national, fails to explain even so important and

familiar a fact as the reception of a foreign system of law in Germany. His philosophy is beginning to be seriously attacked even by representatives of the historical school. In an article published about two years ago, "On the boundary lines of historical jurisprudence," Professor Bekker, of Heidelberg, takes a despondent view of the condition of his science. He asks for reasons why jurisprudence is outrun by natural science, history and even philology, both in actual results and in popular interest. The latter he is sure will come with the former; for it is only success that attracts. He demands better method and better co-operation, and, with the true scholar's spirit, more thorough investigation of the material. At the same time, and very wisely, he recommends the adoption of a more attractive style of writing, a most desirable reform in view of the forbidding and esoteric character of most legal works. "Where we do not write for scholars only," he says, "still our works are written for a strictly limited public of students and practitioners. The art of treating questions of jurisprudence scientifically, and at the same time in a manner that is generally intelligible and interesting, has become rare." But it is admitted that the fault lies chiefly with the narrow range of the science, and that the true remedy is to be found in the application of the comparative method. In view of the fruit this method has borne in natural science, its adoption has become a necessity. Even the very limited use thus far made of it in jurisprudence has almost accomplished a scientific regeneration.

In this new field both historical and philosophical jurists may meet to work together. The historical school virtually abandons its old exclusiveness, although it does not admit the priority of other claims. It is still filled with the inherited distrust of philosophical speculation. Professor Bekker, in his article, makes no reference to Ihering, or Dahn, or Post, prominent leaders of the new movement; and yet Ihering has in a large measure solved the problem so anxiously discussed by Bekker. In his *Geist des römischen Rechts* — that marvel of ability, as it has recently been called by an English critic — he has almost succeeded in making jurisprudence popular. His work presents

a most attractive combination of historical and philosophical treatment, and he makes excellent use of the limited store of foreign law at his command. We may agree or disagree with his theories and conclusions; but his method ought to commend itself to jurists, if not for its intrinsic merit, at all events for its undoubted success.

In Germany, the adoption of a civil code for the whole empire, which is now under consideration, may also be expected to have a salutary effect upon jurisprudence. So far both Roman and German private law have, in their traditional form, been in actual force, though limited by a continual reduction both in territory and in range of subjects. This fact has necessarily affected the historical treatment of legal questions. Even where codes have existed, the two historical systems have been felt to be of practical influence as the common law of Germany. To a certain extent this will continue to be the case for some time; yet the new formal creation of a national body of private law will, by placing practical jurisprudence upon a modern and well-defined basis, relegate history to the position which it ought to occupy. In this sense the new code may effect an emancipation of science from subserviency to practical considerations, and may set free energy and interest for a higher treatment of jurisprudence. Some such view is taken by Ihering when he says:

The fact that the Roman law has been superseded formally in the greater part of the territory where it used to be in force, is of the same determining influence upon life and science as its former reception. The formal unity of the science resulting from the recognition of a common code in the greater part of Europe—the collaboration of jurists in the various countries on the same material and the same task—is gone forever. Science has been degraded to sectional jurisprudence; political have become scientific boundaries. A lamentable and unworthy condition of science! But it is in its own power to break down such barriers and, in the form of comparative jurisprudence, to secure for all time that universality which it so long enjoyed. The method will be different, the judgment more matured, the treatment of the material more liberal, and the apparent loss will be a gain, raising the science of law to a higher level.

We may concur in the hopes so eloquently expressed ; but it can scarcely be admitted that the collaboration of the jurists of various countries is gone forever. On the contrary, the methods of comparative jurisprudence can be successful only through such collaboration. Any highly developed system of private law must receive its scientific interpretation, in the first instance, from those who are in close contact with its practical operation ; and it is from those that foreign jurists must draw their information. Germany alone cannot produce a science of comparative law unless aided by the jurists of other countries. And from no quarter could the Germans derive more valuable aid than from English and American jurisprudence. At the beginning of this century the civil law of Roman origin was virtually the common law of Europe, and therefore of the civilized world. The private law of England presented almost an anomaly in its isolation. But since then the English common law has spread over a new world, and rules now as wide a territory and perhaps as many people as the civil law. We have thus two great legal systems, standing side by side, assimilating rapidly through identical conditions of civilization and the close intercourse of nations, but without losing their historical continuity. The understanding of legal problems must gain infinitely through the study of the evolution of two systems, from independent sources and in different forms, to substantially the same results. But this work has hardly been begun as yet. The comparative study of jurisprudence is now chiefly confined to primitive systems of law. But the village community and the patriarchal system are not a sufficient foundation for a science of law. To a philosophical conception of law, the study of its early beginnings is no more essential than that of its more refined developments ; and in this latter study there is the great advantage that, its data being accessible and abundant, its conclusions need not rest upon a basis of uncertain evidence and doubtful conjecture.

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